Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

EVERETTE O. BAKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEVENTH CIRCUIT'S RELIANCE ON A DE MINIMIS VIOLATION OF THE TRAVEL ACT TO SUPPORT A CONVICTION FOR LAUNDERING ALL THE PROCEEDS OF A PURELY LOCAL PROSTITUTION BUSINESS REPRESENTS AN UNCONSTITUTIONAL FEDERALIZATION OF A STATE CRIME AND IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN JONES V. UNITED STATES

II. WHETHER FORFEITURE OF DEFENDANT'S BUSINESS AND OVER FOUR MILLION DOLLARS AS A RESULT OF LAUNDERING LESS THAN THREE THOUSAND DOLLARS BASED ON A PREPONDERANCE OF THE EVIDENCE STANDARD IS CONTRARY TO THIS COURT'S DECISIONS IN UNITED STATES V. BAJAKAJIAN AND APPRENDI V. NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Everette O. Baker respectfully requests that a Writ of Certiorari issue to review the judgment and opinion entered in this proceeding on September 20, 2000 by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion is reported at *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000). A copy of this opinion appears at Appendix A.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit issued its opinion on September 20, 2000. This Petition for Writ of Certiorari is filed within 90 days of that opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8, clause 3 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18, United States Code, Section 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with the intent to —
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed . . . .

Title 18, United States Code, Section 1956 provides in pertinent part:

> (A)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to . . . a fine . . . or imprisonment for not more than twenty years, or both.

Title 18, United States Code, Section 982(a)(1) provides in pertinent part:

> The court, in imposing sentence on a person convicted of an offense in violation of . . . section 1956, 1957 . . . of this title shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

STATEMENT OF THE CASE

Quite simply, this case is, in essence, a federal prosecution of the state crime of keeping a house of prostitution, a misdemeanor under Illinois law. Although cloaked in the garb of a federal money laundering case, the prosecution herein was clearly directed at closing down defendant's Brooklyn, Illinois massage parlor business. Even the Court of Appeals recognized the state interest involved in the prosecution: "While local officials apparently weren't inclined to interfere with Baker's illegal enterprise, the federal prosecutors had seen enough." App. A at A4. Following a raid on his business and the inevitable grand jury investigation, Mr. Baker was indicted.

The indictment, in addition to a forfeiture count, charged Mr. Baker with fifteen counts of money laundering in violation of 18 U.S.C. 1956[1], six counts of money laundering in violation of 18 U.S.C. 1957[2], and

---

[1] Each of the fifteen counts was based upon a check written from a business account controlled by Mr. Baker during either 1994 or 1995. Most of these checks were for payroll or specific business purposes.

[2] Five of the six counts involved repayment of a construction loan for the Fantasyland Complex which housed a night club and bookstore as well as a massage parlor. These checks were all issued in 1995. The sixth count related to a bond posted by Mr. Baker in 1997 for a friend in connection with an unrelated matter.

one count of conspiracy to launder money in violation of §1956. The conspiracy allegedly commenced in 1989 and ended in 1997. Both section 1956 and section 1957 prohibit financial or monetary transactions with the proceeds of "specified unlawful activity." According to the indictment the specified unlawful activity which served as a predicate for the money laundering charges was a violation of 18 U.S.C. 1952(a)(3). This statute, also known as the Travel Act, prohibits, in the context of this case, the use of interstate facilities with the intent to promote or facilitate a business enterprise involving prostitution offenses in violation of state law and thereafter the performance of any act to facilitate the illegal activity.

Mr. Baker, according to the indictment, used or caused the use of interstate facilities to clear credit card charges incurred by customers for payment of prostitution services. The use of these interstate facilities was, according to the indictment, with the intent of facilitating the carrying on of a business enterprise involved in a conspiracy to keep a place of prostitution in violation of Illinois state law. The indictment identified 15 specific instances in which a credit card was used to purchase prostitution services at defendant's business and interstate facilities were used to process the credit card charges. After each approval prostitution services were provided to the customer. These transactions only occurred over an eight month period in 1993 and early 1994 and totaled $2590. The indictment identified no other specific transaction in interstate commerce nor was Mr. Baker charged with any substantive or conspiracy violations of the Travel Act.

At trial, the government presented evidence that for an eight year period from 1989 through 1996 Mr. Baker

operated one or more massage parlors in the Brooklyn, Illinois area. Customers were charged a fee for a massage and use of a room in which the massage was to be performed. These fees were paid either in cash or by use of a credit card. The funds were kept by the business and deposited into Mr. Baker's business checking account. Mr. Baker also had a merchant account for the purpose of clearing credit card transactions. The women who gave massages often solicited tips in return for performing various sex acts. The tips were paid to the women either in cash (the method preferred by the women) or by way of a credit card. The women kept the proceeds from the actual prostitution services.

Although a great deal of testimony regarding prostitution and the use of credit cards to pay for such services between 1989 and 1995 was introduced at trial, the government only proved the actual use of interstate facilities in connection with acts of prostitution on the fifteen instances over an eight month period totaling $2590 alleged in the indictment. Since credit cards were used by customers on occasion to merely pay for room rental and/or provide a tip in connection with a "straight" massage (one without prostitution services being provided), evidence of the use of credit cards alone did not establish the use of interstate facilities to pay for prostitution services as charged in the indictment.

However, at the conclusion of the trial, the district court, at the request of the government, instructed the jury that the government did not have to prove that an act of prostitution occurred after a credit card transaction was conducted. In other words, the trial court told the jury that the government did not have to prove the allegations in the indictment which established the predicate Travel Act violations for the money launder-

ing charges. Instead, the jury was told that the government need merely prove that a credit card transaction entitled a customer "to spend time with a masseuse and provided the patron with the opportunity to engage in sex acts." In closing arguments, the prosecutor argued, based on these instructions, that use of a credit card for the "opportunity" to engage in sex was sufficient for conviction and that the government did not have to even prove that the patron received sex. The prosecutor then told the jury that defendant was guilty of the money laundering charges if he "spent or withdrew money from the illegal business". In rebuttal argument the prosecutor told the jury that the only issue was "whether Mr. Baker laundered proceeds of prostitution."

Following Mr. Baker's conviction, the district court (after former counsel waived jury trial on the forfeiture count), determined the issue of forfeiture applying a preponderance of evidence standard. In so doing, the district court rejected defendant's contention that forfeiture was limited to the amounts derived from the specific Travel Act violations alleged in the indictment because only the proceeds from the Travel Act violations would constitute "proceeds of the specified unlawful activity" as required by §1956. Instead, the district court held that

> the "specified unlawful activity" which underlies the money laundering charges in this case is the prostitution-related activities in violation of Illinois state law, not merely the credit card transactions which paid for the prostitution services.

United States v. Baker, 82 F.Supp.2d 936, 941 (S.D. Ill. 1999).

Given the view that the proceeds of the state prosecution offenses formed the basis for forfeiture, the trial court found that in addition to Mr. Baker's business, $4.4 million, representing the income from the massage parlors for the period of the conspiracy was subject to forfeiture. The district court also rejected defendant's Eighth Amendment objection by concluding that "although the underlying crime of prostitution is a state offense, the federal money laundering statute is valid and applicable in this case, and forfeiture is proper in this case and does not amount to an excessive fine." 82 F.Supp.2d at 940.

On appeal, the Seventh Circuit sustained defendant's conviction, rejecting Mr. Baker's argument that the instructions given by the trial court and the prosecutor's closing argument in connection therewith impermissibly amended the indictment, resulting in a conviction for federal money laundering predicated solely on state prostitution offenses. The Court of Appeals concluded that the indictment did not make committing an act of prostitution material to the Travel Act violation and thus no constructive amendment of the indictment occurred. According to the Seventh Circuit, Mr. Baker "only need use interstate facilities with the 'intent to carry on' his conspiracy to keep a place of prostitution." App. A at A11. Thus, the court reasoned, the Travel Act violation is predicated "on a customer presenting his card credit card to obtain prostitution services, not on the customer having actually obtained such services". *Id.* In so ruling, the appellate court adopted the reasoning of the district court placing the emphasis in a Travel Act violation on the local prostitution offenses rather than the existence of a significant or substantial relationship between that business and the use of interstate facilities.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RELIANCE ON A DE MINIMIS VIOLATION OF THE TRAVEL ACT TO SUPPORT A CONVICTION FOR LAUNDERING ALL THE PROCEEDS OF A PURELY LOCAL PROSTITUTION BUSINESS REPRESENTS AN UNCONSTITUTIONAL FEDERALIZATION OF A STATE CRIME AND IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN JONES V. UNITED STATES

The constitutional difficulties presented by this case are not unknown to the Seventh Circuit. In a prior federal prosecution of state prostitution offenses, the court of appeals observed,

> This is a classic example of federalization of a traditional state crime, prostitution, in order to obtain enhanced sentences by converting the state crime into money laundering, a federal offense. It demonstrates how an aggressive United States Attorney can use the money laundering statute as a means to take over from state prosecutors the prosecution of long-established state crimes and, in the process, secure more draconian sentences and increase the already overcrowded federal prisons.

United States v. Montague, 29 F.3d 317, 318 (7th Cir. 1994) In *United States v. Griffith*, 85 F.3d 284, 287-288 (7th Cir. 1996), the Seventh Circuit, after favorably quoting the above-referenced language in *Montague*, also observed "One can imagine a scenario where a local prostitution offense might lack a federal dimension."

Similarly, the Seventh Circuit has long recognized that the interstate travel or use component of a violation of the Travel Act "must relate significantly, rather than incidentally or minimally, to the illegal activity." *United States v. Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988). The constitutional underpinnings for the necessity of a significant interstate component has likewise been recognized by the court of appeals below:

> The federal courts must guard against unduly expansive interpretations of the Travel Act that threaten to "alter sensitive federal-state relationships" or "transform relatively minor state offenses into federal felonies."

United States v. McNeal, 77 F.3d 938, 944 (7th Cir. 1996) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Despite criticism of the government for bringing money laundering prosecutions predicated on purely local prostitution offenses and recognition of the concerns expressed by this Court regarding the sensitive federal-state relationships involved in law enforcement, the Seventh Circuit has continued to affirm convictions which offend these very principles. As a consequence, a body of circuit jurisprudence has developed that is not only draconian and in direct conflict with a long line of decisions by this Court, but also usurps specific criminal policy decisions made by the State of Illinois. This case is the most recent example of the expansive view of federal criminal jurisdiction employed by the Seventh Circuit and demonstrates that this Court must intervene to insure conformity with its rulings.

The Constitution, in Article I, §8, delegates to Congress the power "to regulate Commerce with foreign

Nations, and among the several States, and with the Indian Tribes." This Court, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), while generally continuing the expansion of Congress' power under the Commerce Clause, nevertheless warned that the scope of the power of the federal government under the commerce clause

> may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would eventually obliterate the distinction between what is national and what is local and create a completely centralized government.

This concern is particularly significant in the area of enforcement of criminal laws which has been primarily relegated to the individual states. *Screws v. United States*, 325 U.S. 91, 109 (1945) ("Under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope those delegated powers, has created offenses against the United States."); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). As a consequence, when Congress criminalizes conduct already denoted as criminal under state law, it creates a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396, 411- 412 (1973).

In *Rewis v. United States*, 401 U.S. 808 (1971), this Court considered the issue of federal-state relationship and the resulting limitations on federal police power as a consequence thereof specifically in the context of the Travel Act. The issue before the Court was whether the

Travel Act encompassed the operators of a state gambling business whose customers included individuals who traveled interstate for the purpose of betting. Noting first that the limited legislative history of the Travel Act revealed that the Act was directed at organized crime and specifically persons who reside in one state while managing illegal activities located in another state, the Court went on to reflect on what Congress did not say. The Court found significant that Congress did not discuss the issue that an expansive Travel Act would "alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations in which the geographic origin of the customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. at 812. Since these issues were not addressed in the legislative history of §1952, this Court concluded that "Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another state. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of §1952." 401 U.S. at 812. *See also, United States v. Bass*, 404 U.S. 336, 349-350 (1971) ("In the instant case, the broad interpretation urged by the government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial expansion of federal police resources.").

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court significantly limited the scope of federal jurisdiction in law enforcement. In *Lopez*, this Court invalidated the Gun-Free School Zones Act (18 U.S.C. 922(q)) which made it a federal crime to possess a firearm within 1,000 feet of a school. After an extensive histori-

cal review of the jurisprudence describing the extent of Congress' power under the Commerce Clause, the Court rejected the government's position that possession of a firearm in a local school zone in fact affected interstate commerce because of the potential resulting violent crime which would have an adverse impact on the national economy. "[I]f we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564. In *Lopez*, this Court clearly signaled that an expansionist reading of the federal government's power under the commerce clause would not pass constitutional muster:

> To uphold the government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.

514 U.S. at 567.

More recently, this Court, relying on *Lopez*, further restricted the scope of federal police power under the Commerce Clause. In *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000), this Court reversed the Seventh Circuit and set aside defendant's conviction for violating 18 U.S.C. 844(i) in connection with the arson of a private residence. Under §844(i), it is a federal crime to damage or destroy by fire or an explosive any

property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Jones contended that 844(i), when applied to the arson of a private residence, exceeded the authority vested in Congress under the Commerce Clause. 120 S.Ct. at 1908. The government argued that a prosecution for the arson of a private residence was a constitutional application of §844(i) because the private residence was "used" in activities affecting interstate commerce. Specifically, the government contended that sufficient interstate nexus was demonstrated by a mortgage having been obtained from an Oklahoma lender, a casualty insurance policy having been issued from a Wisconsin insurer and the receipt of natural gas from outside the state of Indiana. 120 S.Ct. at 1910. This Court rejected the government's position, observing that, "Were we to adopt the government's expansive interpretation of §844(i), hardly a building in the land would fall outside the statute's domain." 120 S.Ct. at 1911. If the de minimis interstate connections relied upon by the government were sufficient to trigger §844(i), the Court reasoned, the statute's commerce-affecting activity limitation would have no meaning. Relying on the principle that a statute should be construed in such a manner as to avoid grave constitutional questions, this Court concluded:

> Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read §844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement". . . . We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the

> federal-state balance" in the prosecution of crimes. . . . To read 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. [citations omitted].

120 S.Ct. 1912.

The decision of the Seventh Circuit in this case simply cannot be squared with this Court's teachings in *Rewis*, *Lopez* and *Jones*. Regardless of whether the interstate nexus for the predicate Travel Act violation underlying defendant's money laundering conviction is viewed from the theory espoused in the indictment (fifteen uses of a credit card to obtain prostitution services totaling $2590 during an eight year period) or that adopted by the district court and the Seventh Circuit (the credit card need not even be used to obtain prostitution services), no substantial relationship between the local offenses and interstate commerce is established. Indeed, under the Seventh Circuit's view, even if no state crime is associated with the use of the credit card, the fact that it was used at a place of business where prostitution occurs creates federal jurisdiction to prosecute the owner of the business.[3] However, if no illegality is involved in the use of the card, how can the income derived therefrom be proceeds of unlawful activity for money laundering purposes? Just as 15 uses of a credit card over eight years to purchase prostitution services is too attenuated to invoke federal jurisdiction so too is a theory of interstate nexus predicated upon the purchase of lawful services with a credit card. The Seventh Circuit's

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[3] The court of appeals did not explain how paying for non-prostitution services facilitates a business based upon prostitution.

interpretation of the Travel Act is so expansive that it federalizes a purely local criminal offense and therefore results in an unconstitutional application of both the Travel Act and the money laundering statutes.

As a consequence of the unconstitutional expansion of these federal criminal statutes, Mr. Baker's sentence, prior to a downward departure predicated on health concerns, was twenty years, the maximum sentence authorized by 18 U.S.C. 1956. This sentence was arrived at by taking into account the amount of money generated by the massage parlor businesses and defendant's role in operating these businesses. The same conduct under Illinois criminal law would have resulted in a misdemeanor conviction or, at the most, a three year maximum prison sentence. In *Jones*, Justice Stevens noted that the fact that the defendant in that case received a federal sentence of 35 years when the maximum penalty under corresponding state law was only 10 years demonstrated how federal intervention in local law enforcement may "effectively displace a policy choice made by the State." *Jones v. United States*, *supra*, 120 S.Ct. at 1912. Here the disparity in sentencing was 20 times greater than the misdemeanor violation of keeping a house of prostitution and almost 7 times greater than the state felony conspiracy maximum of three years. Little question exists that the Seventh Circuit's failure to abide by the decisions of this Court has resulted in the total displacement of a policy decision by the State of Illinois as to the seriousness of defendant's conduct. Such a result cannot pass constitutional muster and must be reversed.

II. FORFEITURE OF DEFENDANT'S BUSINESS AND OVER FOUR MILLION DOLLARS AS A RESULT OF LAUNDERING LESS THAN THREE THOUSAND DOLLARS BASED ON A PREPONDERANCE OF THE EVIDENCE STANDARD IS CONTRARY TO THIS COURT'S DECISIONS IN UNITED STATES V. BAJAKAJIAN AND APPRENDI V. NEW JERSEY

An unconstitutional collateral consequence of the Seventh Circuit's federalization of a state crime is the disproportionate forfeiture of in excess of four million dollars predicated on defendant "laundering" less than three thousand dollars.

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court held that criminal forfeiture pursuant to 18 U.S.C. 982 violates the Excessive Fines Clause of the Eighth Amendment if it is grossly disproportional to the gravity of a defendant's offense. 524 U.S. at 334. The defendant in *Bajakajian* was discovered to have approximately $357,144 in his possession as he waited at the Los Angeles International Airport to board a flight to Italy. Since Mr. Bajakajian had failed to report that he was transporting more than $10,000 out of the United States, he was indicted for a reporting violation under 31 U.S.C. 5322(a) and lying to government agents in violation of 18 U.S.C. 1001. The third count of the indictment sought forfeiture of the seized $357,144 pursuant to 18 U.S.C. 982(a)(1). 524 U.S. at 324-325. After a bench trial, the district court found the entire $357,144 was subject to forfeiture because it was "involved in" the offense. *Id.*

In reversing the forfeiture in *Bajakajian*, this Court determined that the amount of the forfeiture was disproportionate to the gravity of the crime for which defendant was convicted. In so concluding, this Court relied on the following factors: 1) defendant's crime was solely a reporting offense; 2) the money was unrelated to any other unlawful activities; 3) defendant was not a person to whom the statute was primarily directed; 4) defendant's sentence reflected a minimal level of culpability, and; 5) the harm caused by defendant was minimal in that there was no fraud on the government or loss to the public fisc. 524 U.S. at 338-339.

Clearly the type of gross disproportionality envisioned by this Court in *Bajakajian* is present in this case. First, the amount of money laundered from the specified Travel Act violations charged in the indictment and proved at trial was only $2590, but the amount ordered forfeited was $4.4 million. This results in a forfeiture *1500 times greater* than the amount of proceeds from the specified unlawful activity actually laundered. The Seventh Circuit acknowledged that, in the forfeiture context, the proceeds of the specified unlawful activity consisted of only the credit card transactions for prostitution services and that the district court's basis for forfeiture, that the funds were derived from state prostitution offenses, was erroneous. App. A. at A26. Nevertheless, the court of appeals went on to affirm the district court's forfeiture order on the basis that the funds were "involved" in the offense of conspiracy to launder the proceeds of his prostitution business or as funds used to facilitate the conspiracy. App. A at A27. However, this alternative basis for forfeiture, even if permissible, does not change the excessive fines analysis since the Seventh Circuit agreed that the

proceeds of the specified unlawful activity which were laundered consisted of only the $2590. App. A at A26. It is this figure which must be considered in the *Bajakajian* grossly disproportionate analysis.

Although money laundering is the type of crime at which §982 is directed, the criminal conduct in this case was clearly one of the most benign types of money laundering. No organized crime component was present nor was any violence or other criminal conduct alleged or proven. Furthermore, Mr. Baker used the same company in which he was identified as the owner to open both the credit card clearing and business bank accounts. The proceeds were disbursed by means of check. On his personal and corporate tax returns, Mr. Baker identified the business as a massage parlor. Thus, there was no concealment involved and the "laundering" consisted of merely depositing and withdrawing funds from a bank account.

Nor was any fraud on the government or depletion of the public treasury involved. Indeed Mr. Baker's corporate and personal tax returns were used by the government to establish the income from the businesses which in turn was used to determine the amount of forfeiture. At no time was any suggestion made that Mr. Baker did not truly and accurately report all income or pay the required taxes.

Perhaps most significantly, from an excessive fines/proportionality standpoint, the $4.4 million dollars ordered forfeited was, in large measure, no longer in existence. The money consisted of deposits and expenditures made over the course of the eight year conspiracy. Thus, little of the money existed at the time of defendant's conviction and all of defendant's assets are

now subject to forfeiture (including his home, car, clothes, etc.) as substitute assets. Complete destitution, following release from prison in fifteen years (when defendant will be in his mid-seventies), by any standard, is grossly disproportionate to the crime of depositing $2590 of proceeds from a crime that is a misdemeanor under state law in one's checking account.

Even the Court below suggested that the amount of the forfeiture in this case might constitute an excessive fine. App. A. at A30. Nevertheless, the court ducked the issue by mistakenly suggesting that the issue had not been raised. *Id.* In fact, Mr. Baker had raised the Eighth Amendment excessive fines issue in the trial court. The district court, however, summarily rejected this argument by simply stating, "Clearly, although the underlying crime of prostitution is a state offense, the federal money laundering statute is valid and applicable in this case, and forfeiture is proper under §982, and *does not amount to an excessive fine*." 82 F.Supp.2d at 941. [emphasis added]. In his brief, defendant, while not citing *Bajakajian*, argued that the $4.4 million dollar forfeiture was clearly disproportionate since the $2590 constituted only .047% of the amount deposited in the bank accounts during the period in question. Appellant's Brief at 48. Mr. Baker also argued that these "minuscule amounts of laundered funds cannot possibly justify forfeiture of the entire bank account." *Id.* It is indeed disingenuous for the Seventh Circuit to reject the basis for the district court's ruling, justify the conclusion of the district court on alternative grounds and then not even consider the constitutional basis for setting aside the forfeiture rejected in the district court's reasoning and fairly addressed in Mr. Baker's brief.

The order of forfeiture in this case also suffers from a different constitutional defect. In *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 2362-2363 (2000), this Court specifically held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." No reference is made to forfeiture in the penalty provisions for money laundering under either §1956 or §1957. Yet, this Court held in *Libretti v. United States*, 516 U.S. 29, 39 (1995) that criminal forfeiture is punishment imposed on a convicted defendant *in addition* to any other sentence imposed. As a consequence, criminal forfeiture is a penalty for a crime beyond the statutory maximum otherwise imposed upon conviction. Under *Apprendi*, therefore, the facts supporting forfeiture must be presented to a jury and proven beyond a reasonable doubt.

Although Mr. Baker, through trial counsel, waived a jury determination of forfeiture, the district court, in determining whether to order criminal forfeiture in this case, relied on a preponderance of the evidence standard. 82 F.Supp.2d at 940. Although this case was briefed and argued in the Seventh Circuit prior to this Court's decision in *Apprendi*, the applicability of *Apprendi* to this case was brought to the attention of the Court of Appeals after oral argument through a letter citing additional authority. The Seventh Circuit ignored the implications of *Apprendi* in its opinion. Such inattention does not, however, rectify the fatal error in assessing the forfeiture in this case. At a minimum, therefore, the forfeiture order herein must be vacated.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that, upon briefs and argument before this Court, the judgment of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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